A GENERAL OVERVIEW OF THE FCC'S AUTHORITY TO CREATE THE EXISTING PART 15 RULES AN THEIR RELATIONSHIP TO LICENSED SERVICES.

***Ex Parte* Presentation of the Media Access Project relevant to: ET Docket Nos. 03-108, 03-237, 04-151, and 04-186**

PART I: THE FCC HAS AUTHORITY TO CREATE THE "UNLICENSED" ACCESS OF PART 15 AND HAS AUTHORITY TO GIVE PART 15 DEVICES CO-EQUAL STATUS WITH TRADITIONALLY LICENSED SERVICES.

As the Commission has sought to open new bands to Part 15 devices, holders of traditional licensed services have argued that the Commission lacks statutory authority to permit access to bands without traditional licenses.[1] Others have argued that the Commission has no authority to authorize access to bands in which authorized licensed services exist, or that the Commission must impose a higher burden on unlicensed services to prove a lack of harmful interference than it imposes on new licensed services.[2] None of these arguments has merit.

These arguments all stem from a misinterpretation of the 1982 Amendments to Section 301 of the Communications Act. In 1982, to assist the FCC in prosecuting users of citizens band (CB) radio who illegally amplified their transmitter power, Congress clarified that the FCC exercised exclusive control over all intrastate uses of the electromagnetic spectrum, as well as all interstate uses. Communications Amendment Act of 1982, §§107, 111(b); *Communications Amendments Act of 1982 -- National Telecommunications and Information Administration*, H.R. Conf. Rep. 97-765 ("*1982 Conference Report*"). At the same time, Congress created Section 307(e), authorizing the FCC to license by rule the citizens band radio service and certain other services. *Id.* As the Commission had previously justified its Part 15 rules on the grounds that they involved energy

[1] *See* Comments of Cingular Wireless LLC in ET Docket No. 02-380 (filed April 17, 2003) at 2-4.

[2] *See Amendment of Part 15 to allow certification in the 24.05-24.25 GHz Band,* 18 FCCRcd 15944,15948-49 (2003) (discussing Petition for Reconsideration of American Radio Relay League (AARL).

discharges so low as to avoid any impact on interstate commerce and thus lay outside the Commission's jurisdiction, *Amendment of Part 15 of the Commission's Rules Governing Restricted Radiation Devices, First R&O,* 13 RR 1543, 1544 (1955), these parties argue that the Communications Amendments Act of 1982 either eliminated or somehow otherwise altered the Commission's authority to authorize Part 15 devices.

As discussed below, such a reading is clearly false to fact. The FCC created the current Part 15 regime in 1989 (including opening the current 2.4 GHz band) and opened new bands in 1997. *See Amendment of the Commission's Rules to Provide for Operation of Unlicensed NII Devices in the 5 GHz Range*, 12 FCCRcd 1576 (1997). Congress has expressly recognized this exercise of authority with approval. *See* Balanced Budget Act of 1997, Pub. L. 105-33, Section 3002(c)(1)(C)(v) (prohibiting creation of new licensed services in "bands allocated or authorized for unlicensed use pursuant to Part 15" if such services "would interfere with operation of end-user products permitted under such regulation").

Indeed, the legislative history of the 1982 Amendment makes clear that Congress intended the change to Section 301 solely to assist the FCC in particular enforcement matters relating to citizens band radio, not to diminish the FCC's general authority to authorize direct public access to spectrum pursuant to Part 15. *1982 Conference Report* at 31-32 (describing FCC need to prove that operators of CB transmitters engaged in interstate use of radio as unnecessary expense in enforcement actions). The statements surrounding creation of Section 307(e), wherein Congress authorized the FCC to license CB radios by rule, further clarify that Congress intended to address a specific, narrow issue rather than impose sweeping new limits on the well recognized FCC authority. *Id.* at 36 (striking a balance between licensing individual members of the public to operate an

amateur radio service and the need for the FCC to maintain regulatory control). Accordingly, attacks on the Commission's authority to create and expand the current Part 15 regime should be rejected.

Nevertheless, to avoid further distraction and to place judicial review of the Commission's Part 15 rule making on sound footing, the Commission should move quickly to clarify its authority under Part 15. Furthermore, as increasing public access to spectrum has become one of the Commission's primary tools of spectrum reform, the Commission should clarify that it has full authority to determine the proper allocation of spectrum rights between traditional licensed services and devices licensed through Part 15. *See, e.g.,* Kenneth Carte, Ahmed Lajjouji, and Neal McNeil, UNLICENSED AND UNSHACKLED: UNLICENSED DEVICES AND THEIR REGULATORY ISSUES, OSP Paper #39 (2003).

A. Source of Commission Authority For Part 15.

While the Commission and others routinely speak of Part 15 as "unlicensed spectrum," and therefore somehow different from "licensed" spectrum, this is clearly not the case. Section 301 of the Communications Act requires that all intrastate and interstate use of electromagnetic frequency take place pursuant to a "license" issued by the Commission. 47 USC §301. The term "license," however, has broad meaning. While it can certainly refer to a site license detailing the power levels and services of the licensee, this hardly constitutes the only model available to the Commission. To the contrary, the statute explicitly provides the Commission broad discretion in creating licensing regimes. *See, e.g.,* 47 USC §§ 3(42); 303(b); 307(b); 309(j)(6)(F).

Past Commission practice further supports the Commission's discretion to create a system of equipment certification that satisfies Section 301. In *In re Allocation of Spectrum for Radiodetermination Satellite Service*, 104 FCC.2nd 650 (1986), the Commission assigned a Section 301 license

to an equipment manufacturer, with blanket permission pursuant to the license to manufacture transceivers. *Id.* at 666-67. In doing so, the Commission explicitly found that it acted pursuant to its Section 301 authority, and that such blanket authority was consistent with actions taken in other proceedings. *Id.* and n.56. Indeed, the name of the *1987 Part 15 NPRM*, 2 FCCRcd 6135 (1987), and *1989 Part 15 R&O*, 4 FCCRcd 3493 (1989), "Revision of Part 15 of the Rules Regarding the Operation of Radio Frequency Devices Without an Individual License," reflects the Commission's understanding at the time that Part 15 constitutes an appropriate exercise of its Section 301 licensing authority.

Finally, in the related area of licensing under Title II, the Commission has granted a blanket authorization in lieu of a specific certificate of public convenience. In the 1980s, prior to creation of forbearance authority under Section 10, Section 214 of the Act required that all telecommunication service providers obtain a certificate of public convenience and necessity before constructing or extending any line. In several proceedings over time, the Commission found that it could satisfy this licensing requirement by issuing blanket authority for particular classes of carriers to extend or construct lines, despite the fact that Congress had made no such explicit distinction. *See In re Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, *First Report and Order*, 85 F.C.C.2d 1 (1980); *In re Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, *Fifth Report and Order*, 98 F.C.C.2d 1191 (1984). Similarly, nothing prevents the Commission from satisfying its Section 301 licensing requirement by issuing blanket authority to all devices that comply with the Part 15 rules.

To the extent opponents of this interpretation argue that the Commission has failed to secure

from users or manufacturers of Part 15 devices the necessary waiver under Section 304 and Section 309(h) of the Act, these arguments fall on the basis of the plain language of those statutes. Those statutes require such waivers for "station licenses." By contrast, Section 301 requires not a "station license" clearly understood by Congress as a high-power transmitter, but merely a "license."[3] In any event, the Commission has required compliance with the substance, if not the precise form, of Sections 304 and 309(h) by requiring that each Part 15 device bear a clear printed warning setting forth the terms of operation and requiring use of the device to cease operating when deemed necessary by the Commission.

Recently, the Commission has intimated that its authority for Part 15 flows from Section 302, rather than directly from Section 301.[4] *In re Amendment to Allow Part 15 in the 24.05-24.25 Ghz Band*, 18 FCCRcd 15944, 15948-49 (2003). This interpretation has little support in the legislative history of Section 302. Congress created Section 302 as part of the Communications Amendment

[3]That Section 3(43) defines "station license," "radio station license" and "license" as all sharing a basic meaning as "that instrument of authorization" for use of radio "by whatever name . . . designated by the Commission" does not require that these terms must have identical meanings in all respect. Given the strong presumption against surplus language in the cannons of statutory construction, it would be odd if Congress used such different terms merely as synonyms.

[4]In both the *1987 Part 15 NPRM* and the *1989 Part 15 Order*, the Commission cited both Section 301 and Section 302 as relvant sources of authority without elaboration.

Act of 1982. The legislative history speaks of the need to control growing RF interference from home consumer devices, and the need address arguments from equipment manufacturers that the FCC lacked authority to regulate incidental radiators of electromagnetic energy. *1982 Conference Report* at 21-23, 32-33.

Nothing in the plain language of the statute, however, prohibits the Commission's interpretation that Section 302 constitutes separate authority for Part 15 independent of Section 301. Nevertheless, MAP suggests that the Commission stands on firmer statutory ground if it states clearly that a Part 15 device which conforms with the Commission's requirements enacted pursuant to Section 302 meets the licensing requirement of Section 301.

B. The Commission Has Authority To Reexamine Its Traditional Allocation of Rights Among Classes of Licensee and Part 15 Devices.

The Commission has the authority to extend exclusive rights to a band of spectrum for Part 15 devices, or to make Part 15 devices co-equal with or primary to traditional licensed services. Until now, the Commission has maintained a hierarchy of (primary) licensed–>(secondary) licensed –>licensed by rule–> "unlicensed." *See Intelligent Transportation Devices NPRM*, 17 FCCRcd 23136, 23167-68 (2002) (describing hierarchy). But nothing in the Communications Act requires this. To the contrary, where Congress has directly spoken, it has chosen to protected Part 15 devices against interference from the intrusion of new licensed services. Balanced Budget Act of 1997, Pub. L. 105-33, Section 3002(c)(1)(C)(v) (prohibiting creation of new licensed services in "bands allocated or authorized for unlicensed use pursuant to part 15" if such services "would interfere with operation of end-user products permitted under such regulation").

Even if Section 302 constitutes a wholly separate source of authority from Section 301,

nothing in the Communications Act indicates that Section 301 licenses must hold primary status over Section 302 "certifications." To the contrary, the Communications Act consistently treats "licensed services" and services otherwise authorized by the Commission as deserving equal protection. *See, e.g.,* 47 USC § 303(m)(1)(E) (permitting Commission to suspend or revoke license of operator that "willfully or maliciously interfered with ***any other radio communications or signals***) (emphasis added); § 333 (prohibiting malicious interference with any licensed or otherwise authorized operator). Again, it is important to observe that the Act protects all services, however authorized, by imposing limits on traditionally licensed services. *See* 47 USC §§303(m)(1)(E); 309(j)(6)(C), (6)(D), & 6(F); 324; 333. Whatever the source of the Commission's authority for Part 15, therefore, it is in no way subordinate to more traditional station licenses.

In short, whether Part 15 devices are licensed under Section 301 or authorized under Section 302, nothing prohibits the Commission from providing Part 15 devices co-equal status with more traditional station licenses. This is especially true where the Commission opens new spectrum for use or expands the rights of traditional station licenses so that they conflict with pre-existing or proposed Part 15 allocations. For example, in MB Docket No. 03-185, the Commission has proposed granting a second channel to LPTV stations and translators to assist in the digital transition. Because the Commission has not yet granted any such licenses, there is no reason the Commission could not make grant of the additional channel co-primary with, or at least subject to interference by, Part 15 devices proposed to be authorized in ET Docket No. 04-186. Similarly, there is no reason why expanded flexibility awarded to satellite earth stations should receive preference to expanding use of Part 15 devices to the 3650-3700 MHz band, as proposed in ET Docket No. 04-151.

The Commission, of course, need not go so far as to grant Part 15 devices co-equal status. The Commission can retain its traditional scheme in these proceedings. But, in doing so, it should proceed mindful of its full authority. Accordingly, when considering what mitigation measures may be necessary, the Commission should not act with the overabundance of caution that has marked its treatment of pre-existing station licenses.

PART II: WHEN CONSIDERING PART 15 AUTHORIZATIONS, THE COMMISSION MUST TAKE A BROAD VIEW OF THE PUBLIC INTEREST AND THE GOALS OF THE COMMUNICATIONS ACT.

The Commission must pay heed to the goals of Communications Act when considering its regulatory action. Furthermore, the Commission has a duty to ensure that its regulation of the electromagnetic spectrum promotes the values of the First Amendment. *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 390 (1969). Expansion of direct public access to spectrum via the Part 15 rules serves the broad goals of the Communications Act and the interests of the First Amendment. Accordingly, wherever the Commission ***can*** authorize direct public access by expanding spectrum available to Part 15 devices, it ***should*** do so. Furthermore, it should rigorously seek such opportunities as part of its stewardship of the public airwaves.

A. Part 15 Furthers the Goals of The Communications Act.

The Commission has repeatedly found that expanding the Part 15 rules furthers the goals of encouraging "new technologies and services to the public." *See, e.g., Amendment of the Commission's Rules to Provide for Operation of Unlicensed NII Devices in the 5 GHz Range*, 12 FCCRcd 1576, 1580-85 (1997) (finding that expanding unlicensed access furthered interest of developing new technologies, new services, new competitors, deployment of advanced

telecommunications capabilities to all Americans – with an emphasis on rural and educational uses – and helped fulfill the Commission's obligations under Section 257 to promote entry by small businesses and to enhance diversity of information sources); *In re Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses*, 12 FCCRcd 16802, 16913-14 (1997). *See also* Ken Carter, *et al.*, "Unlicensed and Unshackled: A Joint OET-OSP White Paper on Unlicensed Devices and Their Regulatory Issues," FCC Office of Strategic Planning Working Paper #39, Washington, DC: FCC, May 2003.

The paucity of service and the lack of ownership opportunities for minority communities further highlights the importance of unlicensed access. Generally, providers of broadband and other advanced telecommunications services traditionally focus their attention on the wealthiest markets. *See* Leonard M. Banes, "Deregulatory Injustice and Electronic Redlining: The Color of Access to Telecommunications," 56 Admin. L. Rev. 263 (2004). Furthermore, although the Communications Act directs the Commission to use auctions to promote "economic opportunity and competition ... by avoiding excessive concentration of licenses and by distributing licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women," 47 U.S.C. §309(j)(3)(C), ownership of telecommunications facilities remains excessively concentrated in the hands of a few, large corporations. Eli Noam, "The Effect of Deregulation on Market Concentration: an Analysis of the Telecom Act of 1996 and the Industry Meltdown." Working Paper. Columbia Business School, Columbia Institute for Tele-Information (2002). Despite the Commissions consistent efforts to develop bidding criteria that will promote minority and small business ownership, spectrum auctions continue to fail in these goals. *See* Leonard M. Banes & C. Anthony Bush, "The Other Digital

Divide: Disparity In the Auction of Wireless Telecommunications," 52 Cath. U. L. Rev. 351 (2003).

By contrast, unlicensed access creates immediate opportunity for deployment in any community by any entity. The Commission has in the past observed how unlicensed access removes regulatory barriers to minority and small business ownership of telecommunications facilities. *See Section 257 Report To Congress*, 19 FCCRcd 3034, 3077 (2004); *Section 257 Report to Congress*, 15 FCCRcd 15376, 15432 (2002). Nor will communities economically unattractive to incumbents need to wait for broadcast licensees or other incumbents to provide critical services. Rather, these communities will be able to deploy needed systems themselves.

MAP will not dwell at length on the benefits expanded unlicensed access has brought to rural America, inner city and minority communities, and Americans of every walk of life. The Commission and individual commissioners have recognized these benefits in numerous studies, reports, notices, orders, and speeches.[5] Others, such as the New America Foundation, have likewise extensively documented the benefits of unlicensed access.[6]

In weighing how to apportion rights among traditional station licenses and Part 15 devices, the Commission must give these goals of the Communications Act great weight. Unlicensed access will generally facilitate deployment of advanced telecommunications services faster than the Commission's current policy of relying on phone, cable, and licensed spectrum incumbents.

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[5] *See, e.g.*, UNLICENSED AND UNSHACKLED, *supra*; *The Harvest*: *Remarks of Commissioner Abernathy at the Wireless Communications Association International Annual Conference* (June 2, 2004); *Remarks of Commissioner Jonathon S. Adelstein, WISP Forum, South Dakota School of Mines and Technology*, May 25, 2004.

[6] *See, e.g.,* Matt Barranca, "Unlicensed Wireless Broadband Profiles: Community, Municipal and Commercial Success Stories," NEW AMERICA FOUNDATION (2004); William Lehr, "Dedicated Lower Frequency Unlicensed Spectrum: The Economic Case for Dedicated Unlicensed Spectrum Below 3 Ghz," NEW AMERICA FOUNDATION (2004).

Furthermore, it will facilitate speedy deployment in those communities that traditionally must wait the longest for licensed services to deploy. Accordingly, the public interest weighs heavily in favor of permitting the broadest use of Part 15 devices consistent with rational mitigation of genuine risks of harmful interference.

B. Part 15 Provides a "Deregulatory" Means to Further The Goals of Section 706 of the 1996 Telecommunications Act.

The Commission has acknowledged the growing role of unlicensed spectrum access in the deployment of broadband access to all Americans pursuant to the mandate of Section 706 of the Telecommunications Act of 1996. *Unlicensed Operation in the 3650-3700 MHZ Band*, 19 FCCRcd 7545, 7546-47 (2004) (*3650-3700 NPRM*). In considering the value of unlicensed access to the Commission's Section 706 mandate, the Commission should consider that unlicensed access is an inherently "deregulatory" means of promoting broadband deployment. It frees all citizens to access spectrum with readily available consumer devices, rather than restricting the ability of citizens to access the public airwaves. In addition, there is no limit (other than that imposed by the economics of the marketplace) to the number of competitors using unlicensed spectrum access. This places greater emphasis on market mechanisms than does licensing, which creates an artificial scarcity that is aggravated, not alleviated, by allowing licensees to treat government-licensed monopolies as private property.

Accordingly, to the extent the Commission believes that the Telecommunications Act of 1996 encourages the Commission to facilitate deployment of broadband through "deregulatory" means and to rely on market competition, unlicensed access provides a far more potent avenue than any other strategy employed by the Commission to date. If the Commission is serious about

deregulation as a means of promoting competition, rather than as a means of preserving incumbent dominance, the Commission should embrace opportunities both to expand the spectrum available to Part 15 devices and to expand the flexibility of these devices by permitting true "smart" radios capable of dynamic power and frequency adjustment.

PART III: INCREASING SPECTRUM AVAILABLE TO PART 15 DEVICES FURTHERS THE GOALS OF THE FIRST AMENDMENT.

"The 'public interest' standard necessarily invites reference to First Amendment principles...and, in particular, to the First Amendment goal of achieving 'the widest possible dissemination of information from diverse and antagonistic sources.'" *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978) (citations omitted). Indeed, the FCC has a fundamental responsibility to protect the public's "collective right to have the medium function consistently with the ends and purposes of the First Amendment." *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 390 (1969).

As a general rule, discretionary licenses on the right to communicate are repugnant to the First Amendment. *See Generally Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 161-64 (2002). Only because unregulated use of the electromagnetic spectrum by ***everyone*** would make impossible the effective use of the spectrum by ***anyone*** has the Supreme Court permitted the Federal Government to restrict access to spectrum to a handful of government-selected licensees. *National Broadcasting Co v. United States*, 319 U.S. 190 (1943); *Federal Radio Commission v. Nelson Bros.*, 289 U.S. 266 (1933); *In re Nextwave Personal Communications, Inc.*, 200 F.3d 43 (2nd Cir. 1999).

But this does not give the government complete *carte blanche* in managing spectrum. *NBC*,

319 U.S. at 217. To the contrary, the FCC must manage spectrum so as to promote the goals of the First Amendment. *Red Lion,* 395 U.S. at 389-393. In light of the general antipathy of the First Amendment to discretionary licenses as a precondition of speech, the First Amendment imposes on the Commission a responsibility to consider whether direct access by citizens is technologically feasible. *Accord FCC v. League of Women's Voters of California*, 468 U.S. 364, 376 n. 11 (1984).

Given the tremendous imbalance at the moment between the modest amount of spectrum allocated for unlicensed access by all citizens in contrast with the vast amounts of spectrum assigned to exclusive licensees, and given the physical qualities that make this spectrum so inherently valuable for public access, the "reference to First Amendment principles," *NCCB supra*, weighs heavily in favor of opening new spectrum to unlicensed access. While technological limitations of the past generally required exclusive licensing in the hands of a few, this by no means makes exclusive licensing to the exclusion of all others the preferred regime under the First Amendment.

Permitting broader direct access to spectrum by the public serves the First Amendment both by creating more opportunities for people to speak and, concomitantly, more sources for people to hear. As technology continues to advance, and the need for exclusivity diminishes, it serves the interests of the First Amendment to permit as many citizens as possible to access spectrum as freely as possible. *See* Stuart Minor Benjamin, "The Logic of Scarcity: Idle Spectrum As First Amendment Violation," 52 Duke L.J. 1 (2002); Stuart Buck, "Replacing Spectrum Auctions With Spectrum Commons," 2002 Stanford Technology L. Rev. 2 (2002).

As the Supreme Court has found, the First Amendment prohibits the government from granting exclusive rights in communications media unless the physical characteristics of the medium require exclusivity as a precondition of productive use. In *City of Los Angeles v. Preferred*

Communications, 476 U.S. 488 (1986), Preferred Communications did not take part in an auction for an exclusive cable franchise. Nevertheless, it applied for a franchise in competition with the winner of the auction. The City of Los Angeles denied the application. The district court upheld the power of the city to award an exclusive license, but the Ninth Circuit Court of Appeals reversed on First Amendment grounds. *Id.* at 492-93.

The Supreme Court remanded for further fact finding on the question of whether any physical limitations required the city to limit the number of franchises. The Supreme Court explicitly held that the desire of the city to maximize revenue or maximize economic efficiency did not permit limiting the ability of citizens to speak through the new medium any more than the city could limit the number of newspapers in the name of economic efficiency. *Id.* at 494-95. Where the laws of physics no longer require exclusivity, exclusivity cannot be justified on economic or efficiency grounds alone.

MAP does not mean to suggest that technology has advanced to the point where the spectrum may accommodate all who wish to use it, and that therefore the days of exclusive licensing have passed. *Cf. League of Women Voters supra* (observing that technological advances might someday render exclusive licensing obsolete). Indeed, many applications, such as public safety, will continue to demand exclusivity for the foreseeable future. These applications will still require that the Commission impose necessary public interest obligations and service rules in order to ensure that these exclusive licenses serv the public interest, convenience and necessity as required by Section 307 and Section 310(d).[7] The ability of technology to provide unlicensed access to all citizens under

[7]Furthermore, even if scarcity were eliminated as a matter of law, the Commission would

some conditions does not render the underlying basis of *FRC v. Nelson Bros.* or *NBC* obsolete.

Rather, MAP argues that the Commission in the *NPRM* has tentatively concluded that all citizens may access the electromagnetic spectrum freely without creating the harmful interference that justifies exclusive licensing. If the Commission nevertheless decided to limit the right to speak through spectrum in this band to a handful of privileged licensees, for no better reason than to maximize revenue to the government or maximize economic efficiency, that decision would violate the First Amendment principles set forth in *Preferred Communications.*

This principle should apply not merely to new allocations of spectrum, or in cases where incumbents have sought new spectrum rights. Rather, where the Commission is satisfied that it can authorize Part 15 access as an underlay in licensed services, such as proposed in the Interference Temperature *NPRM*, or can allow frequency hopping to allow use of unused spectrum assigned to another service under a geographic license or other license, the Commission should authorize such direct access.

As an aside, MAP notes that nowhere does this principle apply with greater force than in the broadcast bands. Broadcasters receive their spectrum for free, on condition that they provide service to their local community. *Office of Communication of the United Church of Christ v. FCC,* 359 F.2d 994, 1003 (D.C. Cir. 1966). No broadcaster has anything in the nature of a property interest in its spectrum. 47 USC §§301, 304, 309(h); *UCC*. To the contrary, where the Commission finds that a licensee has failed to serve the public interest, the Commission must deny renewal of the license and

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still be required to impose public interest obligations on broadcasters and others, as licensed entities owe their superior position to government exclusivity. *Red Lion*, 395 U.S. at 400.

award it to another steward. 47 USC §309(e).

MAP also notes that distribution by auction does not confer on such station licensees any special right of exclusivity against non-interfering uses. *AT&T Wireless, Inc. v. FCC*, 270 F.3d 959, 964 (D.C. Cir. 2001) (absent harmful interference, introduction of new spectrum users "does not trammel upon [the] rights of licensee[s]"); *Amendments of Part 2 and 25 to NGSO FSS Systems Co-Frequency With GSO and Terrestrial Systems In the Ku Band Frequency Range*, 17 FCCRcd 15849, 159628 (2002); *Revision of Part 15 Regarding Ultra-Wideband Transmission Systems* 17 FCCRcd 7435, 7525-26 (2002). As the Supreme Court has observed "the Government could surely have decreed that each frequency should be shared among all or some of those who wish to use it." *Red Lion*, 367 U.S. at 390-91. Application of the principles of *Preferred Communication* therefore apply to all licensees, regardless of the method of distribution. *See also* 47 USC §§309(h); 309(j)(6)(C); *In re Nextwave Personal Communications, Inc.*, 200 F.3d 43 (2nd Cir. 1999).

Looking beyond the letter of the law, the goals of the First Amendment and the general repugnance of the First Amendment for licensing as a precondition of speech create a high public interest in fostering greater direct access by citizens to the electromagnetic spectrum. In weighing where the public interest lies, the Commission should seek to maximize opportunities for unlicensed access as best serving the goals of the First Amendment. It should therefore reject the demands of incumbents to move in an artificially cramped and restricted manner.

CONCLUSION

The Communications Act vests in the Commission tremendous discretion in how to regulate access to public spectrum. In exercising its authority, the Commission must be guided by the public interest, an assessment that includes the goals of the Communications Act and the First Amendment.

Respectfully submitted,

Harold Feld
Andrew Jay Schwartzman
Media Access Project
1625 K St., NW
Suite 1000
Washington, DC 20006

December 14, 2004